IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 689 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BRAHMAN HEMABHAI NATHUBHAI

Appearance:
MR KC SHAH, APP for Appellant
MR JM BUDDHBHATTI (appointed) for Respondent

CORAM : MR.JUSTICE C.K.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 18/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

#. This is an appeal preferred under section 378 of the

Criminal Procedure Code by the State of Gujarat against the order of acquittal dated 16.5.1990 recorded by the Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.27/88 for the offence punishable under section 17 of the Narcotic Drugs Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act" for short).

#. The prosecution case is that, the accused was found in conscious possession of opium weighing around 620 gm. and valued at Rs.1200/- on 9.6.1987 at about 17.30 at village Soni, Taluka Deodar. His house was raided and according to the prosecution, he was present in the house. The house is described as "Dhaliya" used for the purpose of storing cattle. After going through the recovery panchnama of muddamal opium and the judgment of the learned Additional Sessions Judge under challenge, a query was raised by us to the learned APP Mr.K.C.Shah whether provisions of Section 42 of NDPS Act were complied ? On referring oral evidence as well as the details of the panchnama drawn at the time of recovery of the muddamal opium, he was unable to satisfy us that the provisions of section 42 were complied with by the Raiding Officer. There is a reference of the presence of one Class-I officer of the rank of SDPO who was present at that time, but there is no reference of the presence of this class one officer when actual recovery of the muddamal opium was made. In the presence of the panchas, even if the SDPO-officer of the rank of Class-I of the Police Department had been there, even then in view of the decision of the Apex Court reported in (1994) 3 SCC 299, State of Punjab vs Balbir Singh strict compliance of section 42 was required to be made and in this case we do not see such compliance in stricto-senso. The mandatory provision has been ignored for search and alleged seizer. On this sole ground, this accused could have been acquitted.

#. Before recording our agreement to the reasonings given by the learned Additional Sessions Judge for acquitting the accused, another query was also raised because the panchnama produced before the trial court says about two different offences. It is the case of the prosecution that, on receipt of the information, the house of the accused - respondent was raided and information was to the effect that, he is holding the arms illegally and also dealing with storing and selling of opium. It is not a matter of dispute that, this so called information was not reduced to writing immediately. Firstly, a country made pistol (Tamancha) with some amount of gun powder and nine empty cartridges

(which could be used in constructing the cartridge) which can be loaded in the Tamancha (country made pistol) were recovered. What happened to the criminal case registered against this very accused for the alleged offence punishable under section 25(1) of the Arms Act was queried and on receipt of the written instructions, the learned APP Mr.Shah has submitted that the police had chargesheeted the respondent accused for the offence punishable under section 25(1)A of the Arms Act and the chargesheet bearing NO.6/88 was filed in the court of the Judicial Magistrate, First Class, Deodar on 4.3.1988 and after the trial, the respondent accused was acquitted from the charges levelled against him in that criminal case No.327/88. The date of the order of acquittal is 05.9.1992. He has further accepted that, he has no specific instructions whether any acquittal appeal is preferred by the State of Gujarat before this court. So, that first part of the panchnama has not been believed to be trustworthy piece of evidence, impliedly, by the competent court. This finding would affect adversely to the merits of this case also. It would not be safe to link the accused with the conscious possession of the muddamal opium accepting the second part of panchnama. Sections 100 and 165 of Cr.P.C. are also not complied with, causing prejudice to the accused.

#. Undisputedly, Dhaliya which was raided is having walls at three sides only and fourth side of the dhaliya is upon the vada land. This vada land also does not have a fix entry gate. The same has a very easy access. The ownership of the vada land as well as dhaliya is in dispute. It does not run in the name of the respondent accused in village revenue record. So, it would be hazardous to accept the say of the prosecution that the very respondent accused was in exclusive possession of the dhaliya and the articles lying in it on the date of the raid. It is also there on the record that because of the dispute with the neighbouring family of Shiva Paba and Devshi Patel house-hold articles of the accused and his sister were thrown out by one group which is known as "Patels" of the village and it is there on the record that, prior to the alleged recovery, some of the articles of the room in possession of the sister of the present accused were brought to this vada and dhaliya.

#. It is also clear on record that this respondent accused was also the accused of the offence punishable under section 302 of IPC and the person who succumbed to the injuries allegedly inflicted by the respondent accused had died on a day earlier, that is, on 7th of June, 1987 and the dead body was brought to the village

Soni on 8th. Initially, the respondent accused was arrested for the offence punishable under section 324 of IPC and was also released by the competent court on bail, but as injured victim succumbed to the injuries, graver offence punishable under section 302 was registered against the respondent accused, and therefore, police was supposed to arrest him for that very serious offence. Language of the panchnama gives indication that he must have been arrested prior to the alleged recovery of the muddamal opium and his voluntary or natural presence at the dhaliya at the relevant point of time became doubtful.

#. There are material contradictions and improvements in the evidence of the witnesses examined by the prosecution including the panch witnesses and the members of the raiding party such as application of key to open the iron bag or number of begs found with the muddamal opium. Non-examination of the witness who has helped the police in weighing of muddamal also cannot be ignored. So the case of the prosecution of conscious possession of the contraband opium is rightly disbelieved by the trial court.

#. In light of the above set of facts, we have considered the judgment of the learned Additional Sessions Judge and we are in full agreement with the reasons. When we are inclined to accept the reasons given by the learned Additional Sessions Judge, fresh reasons are not required to be given by us. However, in light of the arguments of the learned APP, we have made the above endeavour in confirming the judgment of the learned Additional Sessions Judge.

#. In a nutshell, there is no merits in the appeal, hence, it is dismissed. The order of acquittal dated 16.5.1990 passed in Sessions Case No.27/88 by the learned Additional Sessions Judge, Banaskantha at Palanpur stands confirmed.

(C.K.Buch,J)

(H.H.Mehta,J)
(pathan)